

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OCTOBER TERM, 1904.

No. 1090.

CABOT T. THOMAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action in equity instituted by the United States against Cabot T. Thomas under the provisions of an act of Congress entitled "An act to prevent unlawful occupancy of the public lands," the same being Chapter 149, page 477, of Supplement to Revised Statutes of the United States, Vol. 1, Second Edition. The bill of complaint alleges the filing of an affidavit with the United States District Attorney, provided for in the second sec-

tion of said act of Congress; the ownership by the United States of the lands described in the complaint, that the lands are public lands; that the appellant, Cabot T. Thomas has violated said act of Congress by unlawfully enclosing and fencing the said lands, and "maintaining said unlawful enclosure and over said lands occupying and asserting exclusive right and control thereof, disallowing all other persons and all other stock, except his own or by his permission, to come upon or pass over said lands;" that the appellant, Cabot T. Thomas, "by force, threats, intimidations and by fencing and enclosing and by other unlawful means, did prevent and obstruct and did combine and confederate with others, to prevent and obstruct any and all persons from peaceably entering upon and establishing a settlement and residence on said described lands or any part thereof; and ever since has and now does by force, threats, intimidations, fencing, and enclosing, and by other unlawful means, prevent, obstruct, combine, and confederate with others to prevent and obstruct any and all persons from peaceably entering upon and establishing a settlement and residence upon said lands, or any part thereof;" that at all the times stated in the bill of complaint the appellant has prevented and obstructed, and ever since has and now does prevent and obstruct, free passage and transit over and through said lands or any part of the same by fences and other unlawful means. The complainant prays for judgment and decree against the appellant declaring the fencing and enclosing and all others acts, doings and things heretofore complained of to be unlawful, and directing and ordering

the said appellant to take down and remove the same immediately, and in case of appellant's failure to remove the enclosure that the U. S. Marshal shall remove the same, and complainant also prays for an injunction perpetually enjoining and restraining the appellant from a continuance or repetition of the alleged wrongful acts of appellant.

Appellant appeared and answered to the bill, admitting the facts alleged in the bill of complaint as to the filing of the affidavit; the ownership by the United States of the lands described in the bill; that the lands are public lands; that the appellant is without ownership or claim or color of title in or to said lands, but denies that said lands or any thereof are or at any time have been inclosed with any fence erected or maintained by him; and denies that the lands or any thereof are in his possession or exclusive use or occupation; and denies that he ever erected or maintained or now maintains any fence upon any of the said described lands, and denies that this appellant has any use or occupation whatever of said lands or any thereof, save and except to the extent that certain stock, cattle and animals belonging to him roam over and graze upon said lands or portions thereof as by law they may rightfully do, said lands being a part of the public domain, and there being no barrier or obstruction to prevent the said stock, cattle and animals from roaming over and grazing upon the said lands in common with stock, cattle and animals belonging to persons other than the appellant; and denies that the appellant has or does assert or exercise exclusive right or control over the lands or any thereof or that he has disallowed or disallows other persons or

stock to go upon or pass over the lands; and denies that he has combined or does combine with others to prevent or obstruct all or any persons or person from peaceably entering upon and establishing a settlement and residence on said described lands or any part thereof; and denies that "he has any fence or obstruction upon said lands or any part thereof," and denies all and all manner of unlawful combination or confederacy, wherewith he is by the bill of complaint charged. The complainant filed the usual replication.

Upon the testimony produced the Court entered judgment and decree in favor of complainant and against the appellant, finding that at the time of the commencement of the suit the appellant "was maintaining and controlling, and has since that time maintained and controlled a strong and substantial fence upon" the lands described in the bill and that he was without right in so doing. The decree required the appellant to take down and remove all of the fences surrounding the lands, enjoined him from further interference with the lands and ordered that in case of failure or refusal of the appellant to remove the fences that the same should be removed by the United States Marshal.

From this judgment and decree the appellant has prosecuted this appeal.

The questions raised by the record are the following:

First. Are or were the lands or any part thereof enclosed by the appellant?

Second. Are or were the lands or any part thereof unlawfully enclosed by the appellant?

Third. Can the appellant be compelled to remove his fence unless all parties who join fences with him are joined with him in the action and by the same decree required to remove their fences?

Fourth. Can appellant be compelled to remove fences owned and controlled by others?

SPECIFICATION OF ERRORS.

The appellant hereby assigns the following as errors committed by the Court below in the determination of this cause, and the rendition of the decree herein :

I.

The Court erred in holding and deciding that the lands or any of the lands described in the bill of complaint were or are enclosed by a fence owned or controlled by the appellant.

II.

The Court erred in its decision in holding and deciding that the lands described in the bill of complaint were enclosed with any fence for the reason that the evidence shows that the said lands were not entirely enclosed with any fence either of the appellant or any one else in connection with the fence of the appellant.

III.

The Court erred in holding and deciding "that the said Cabot T. Thomas was at the time of the commencement of this suit maintaining and controlling and has since

that time maintained and controlled a strong and substantial fence upon" the lands described in the bill of complaint.

IV.

The Court erred in ordering appellant to remove fences owned and controlled by others and in which appellant has no interest.

BRIEF OF ARGUMENT.

Section 1 of the statute under which this action is brought provides that all enclosures of any public lands of any State or Territory in the United States erected or constructed by any person, party, association or corporation where the party enclosing had no color of title, is forbidden and prohibited.

And the assertion of any right to the exclusive use and occupancy of any part of the public lands of the United States in any State or Territory without claim or color of title is likewise declared unlawful and is prohibited.

Section 3 provides that no person by force, threats, intimidation, or by any fencing and enclosing or any other unlawful means prevent or obstruct, or shall combine and confederate with others, to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the Public Land Laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands.

Unless the evidence in this case brings the appellant within the condemnation of one of the Sections of the Statute above referred to, he is not guilty of a violation thereof.

The appellant offered no evidence. There is no contention that the appellant claimed any right or color of title to the Government lands described in the bill of complaint or that he had any right to the possession thereof. It was necessary for the Government to prove that the appellant maintained an *enclosure* of the public lands described in the bill of complaint, or that he asserted a right to the exclusive use and occupancy thereof, or that by force, threats, intimidation, or by fencing or enclosing or any other unlawful means he prevented or obstructed or that he combined or confederated with others to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on any such government lands. It was not contended by the Government that the appellant violated the provisions of Section 3 of the Statute, for there is no evidence showing that the appellant by the means specified in said Section prevented or obstructed other persons from peaceably entering upon or establishing a settlement or residence on the Government lands within the alleged enclosure.

The decree of the Court below finds that the following facts were established by the evidence:

First. That the appellant was at the time of the commencement of this suit maintaining and controlling and has since that time maintained and controlled a strong and substantial fence *upon* a certain tract of public land,

situate, lying and being in the County of Yellowstone, State of Montana, to-wit: (Here follows description of lands as described in the bill of complaint).

Second. That said defendant has no claim or color of title made or acquired in good faith, or asserted right thereto by or under any claim made in good faith with a view to entry thereof at the land office of the district where the same is situate, nor had he any such right at the time of its enclosure, nor at any time since.

Thus it will be seen that the Court below simply found that the defendant was maintaining an unlawful fence *on* the public lands, and does not find that the said fences *enclosed* the lands described therein.

We respectfully submit that the evidence absolutely fails to sustain the finding and decision of the Court, and upon the contrary establishes the fact that the appellant did not maintain any *enclosure* of any of the lands described in the bill of complaint. The bill of complaint charges the appellant with a violation of Section 3 of the act of Congress, but there was no evidence tending to show a violation of said Section, neither does the decree of the Court declare a violation of that Section.

We submit that plaintiff's Exhibit B, pages 23, 24, 25, 26, 27, 28 and 29, was improperly admitted by the examiner for the reason that same is incompetent, there being no certificate of the clerk attached thereto showing that the same was a true copy. The same is also true of plaintiff's Exhibit C, purporting to be a decree of the Court in the same action, there being no exemplification to the alleged decree, it was wholly incompetent and

should not be considered by this Court in the determination of this cause.

According to the plat prepared by J. F. Tilden, a witness on the part of the Government, and the person who made the affidavit upon which the bill of complaint is based, the appellant had no lands entirely enclosed by fences. (See page 21 of the record). The red lines on this plat are intended to show the fences of the appellant, and it will be seen from examination thereof that no lands are enclosed by this fence, and it will be seen from the evidence that were it not for the fences of others, in which the appellant had no interest, and which were not erected or maintained by the appellant, there would be no enclosure at all of the lands described in the bill of complaint.

Yet the Court found that the appellant at the commencement of this action maintained and controlled a substantial fence *upon* the lands described in the bill of complaint. (Page 17).

We submit that this language of the decree does not conform to Section 1 of the Statute, in that it fails to find that the lands described were *enclosed*. There is a difference between maintaining a fence *upon* public lands, and an *enclosure* of public lands. In fact the decree nowhere recites that the appellant unlawfully *enclosed* any of the public lands of the United States. The evidence conclusively shows that without the joining of fences with others, the appellant did not, or could not have *enclosed* the lands mentioned in the bill. Unless the evidence shows that there was a combination or confederation be-

tween the appellant and others to prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon a tract of public land, the appellant is not guilty of a violation of the Statute, and it will not be contended by the Government that there was any such combination or confederation as contemplated by the Statute.

Upon the question of the different ownerships of the fences said to enclose the lands described in the bill, we call attention to the testimony of the several witnesses for the Government.

J. F. Tilden, pages 34 and 35. "Why I think I can give nearly all the names. Yes, sir. There are several pieces of fence owned by different parties." Witness describes plat inserted as pages 21 and 22 of the record, and testifies on page 35 that the fences of the defendant are indicated by the red lines. There may be other persons owning a portion of the fences making the enclosure. (Page 36). The fence extending along the west side of Section 5, 8, 17 and 20, Township 1, South Range, 21 East, belongs to C. T. Thomas and Edward Cardwell. (Page 37). Thomas' fence connects with Rudolph Molt on the north. (P. 39). There were no fences within those townships separating odd and even sections within the enclosure. (P. 40). On pages 48, 49, 50, 51, 52 and 53, this witness testifies that the appellant joins fences with Edward Cardwell, Herman Witt, Alf. Thomas and Rudolph Molt. On page 52 this witness testifies that the appellant owns the greater portion of these fences as indicated by the red lines on the plat, and that the red lines

indicate portions of fences owned by appellant and portions of fences owned by others. On page 53 he testifies that if Alf Thomas would take his part of the fence down the lands would not be enclosed. This witness testifies on page 56: "I should judge about 15 miles of other peoples fences, that is other than what Mr. Thomas constructed, the ownership I do not pretend to say." This is in answer to a question as to how much of the fence constituting the enclosure is owned by others than Thomas.

Bert Mitchell testifies on page 62 that the red lines on the plat marked Exhibit A (Page 21 of the record) indicates the fences of the appellant. On page 63 he testifies that appellant's fences connect with fences of Alf Thomas and Edward Cardwell.

Walter Story, on page 70, testifies that there is at least three miles on the north of township 1, south range, 21 East, that there are no fences. On pages 74 and 75 witness testifies that he is not willing to swear that defendant has any lands in township mentioned entirely enclosed by fences owned by himself.

A. H. Murray, on page 77, testifies there is an opening at the Big Lake of two or three miles, probably three miles. Witness testifies on page 78 there is an opening at the southeast corner of that township at Canyon Creek of about three-quarters of a mile. (Page 81). "I would not say that the land was enclosed if the fences only extended part way round. I did not mean that the land was fenced on all sides except the gaps with the fences owned and controlled by the defendant. I would not swear that the lands were entirely enclosed. (Page 82). Could not

swear that any of the lands were entirely enclosed by fences owned or controlled by the defendant. It is true that when this Lake is dried up the lake is no barrier to stock going into what I call Thomas' enclosure. Stock could have entered into what I call Thomas' enclosure through and over this Lake since the first of September. I think they could have entered any time last summer by going around the corner of the fences where the water had receded. There is nothing to prevent cattle going through this canyon I spoke of." (Page 84.) Witness testifies: "The fence on the west side of what I call the defendant's enclosure I supposed belonged to A. I. Thomas, and it was built there first." "It was built before the defendant built his fence." "I cannot swear positively that the defendant has any lands fenced in that section of the country that are entirely enclosed by a fence owned by himself."

The judgment is not sustained by the bill of complaint. The bill of complaint alleges that the appellant has unlawfully enclosed public lands. The Act of Congress prohibits the unlawful enclosure of public lands.

The judgment recites that the appellant was at the time of the commencement of this suit maintaining and controlling and has since that time maintained and controlled, a strong and substantial fence *upon* that certain tract of public lands, situate, lying and being in the County of Yellowstone, State of Montana. (Description of lands). There is not a word in the decree showing that the appellant maintained or controlled a fence *enclosing* the lands therein mentioned. The act of Congress under which

this case is prosecuted nowhere mentions the unlawful maintenance of fences *upon* public lands, but expressly provides against the unlawful *enclosure* of such lands; and Section 2 of the act certainly contemplates that all persons concerned in the unlawful enclosure of such lands shall be made parties defendant.

Here is a case where it requires the fences of at least five other persons, not parties to this action, in connection with the fence of the appellant, to complete the enclosure of the lands described in the bill. The decree decides that all those fences are maintained and controlled by appellant, a fact not supported by the evidence. The decree requires appellant to not only remove his own fences, but to remove the fences of his neighbors, which provision renders the decree absolutely void. Either the appellant or the United States Marshal would be a trespasser, and liable for damages to the owners of the fences, should they, or either of them, remove the fences of persons not parties to this action.

It is a fundamental principle of law that the judgment must be sustained by the bill, and by the evidence, and we insist that the judgment in this case is not sustained by either.

The judgment cannot be enforced, because it involves rights and property of persons who are strangers to the record, and is therefore void.

We respectfully submit that the judgment of the District Court must be reversed, and the case dismissed.

Respectfully submitted,

O. F. GODDARD,
Of Counsel for Appellant.

